October 17, 2019

SUBMITTED VIA REGULATIONS.GOV

Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0001

      Re: **Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, HUD Docket No. FR-6111-P-02**

To Whom It May Concern:

We write to you on behalf of the American Civil Liberties Union Foundation ("ACLU") in response to the above-docketed notice ("Proposed Rule") concerning proposed changes to the disparate impact standard for the Fair Housing Act ("FHA"), as interpreted by the U.S. Department of Housing and Urban Development ("HUD"). The existing Disparate Impact Rule ("Current Rule"), codified at 24 C.F.R. § 100.500, is crucial to the ongoing fight for equal access to housing in the United States. It serves the American public by providing an incentive for housing providers, financial institutions, insurance companies, municipalities, and other major corporations to eliminate policies that appear neutral yet wrongly and unnecessarily keep people from the opportunities they need to be successful in life. We strongly oppose the proposed changes to HUD's current Disparate Impact Rule.

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and the law of the United States guarantee to everyone in the country. With more than three million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction. The ACLU advances equality through litigation and policy advocacy. The ACLU's priorities include defending the rights of immigrants, advocating for economic justice, and defending the housing rights of vulnerable populations.

As a nation, we have a shared interest in ensuring that housing opportunities are available to every individual, regardless of their personal characteristics. The FHA prohibits intentionally discriminatory acts *and* facially "neutral" policies that disproportionately limit housing opportunities based on race, color, national origin, religion, sex, familial status, and disability. Fully realizing the promise of the FHA for every person in the United States is central to HUD's mission.

Disparate impact legal theories have been essential to the ACLU's fight to protect access to fair housing and housing finance. The ACLU and many of its state affiliates have brought disparate impact claims under the FHA to challenge myriad discriminatory housing policies and practices—including overly restrictive tenant-screening policies and unjust municipal ordinances—across the country.

The Current Rule is consistent with a long, well-settled line of precedent establishing FHA liability for practices that have a discriminatory effect. For more than forty years, courts have interpreted the FHA to authorize disparate impact claims, including the 2015 Supreme Court decision, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015) ("*Inclusive Communities*"). In *Inclusive Communities*, the Supreme Court found "convincing" and "compelling" support for its holding that Congress intended to include disparate impact liability when it enacted the FHA in 1968 and again when it amended the law in 1988.[1] The Court also found that "[r]ecognition of disparate-impact claims is consistent with the FHA's central purpose."[2] The Court explained that disparate impact claims are necessary to challenge policies that are not easily categorized as disparate treatment but that function to unfairly exclude members of protected classes from housing, particularly when overlaid on preexisting and long-standing disparities.[3]

In contrast, absent any legal justification, the Proposed Rule significantly narrows disparate impact liability for discriminatory conduct. Discriminatory barriers to equal housing opportunity remain deeply entrenched and continue to harm our communities. While there has been limited progress, equal access to housing is far from a reality in this country, and HUD's existing rule should not be revised to weaken an essential tool in the fight against housing discrimination. By substantially altering the burden of proof for disparate-impact claims, the Proposed Rule could limit victims of housing discrimination to pleading and proving disparate treatment claims, contrary to the statutory text and *Inclusive Communities*. Instead of effectively eliminating a key tool to fight unjustified discrimination, HUD must focus on vigorous enforcement of the Current Rule to remove unnecessary barriers to housing choice in all communities. The ACLU urges HUD to withdraw its Proposed Rule that will weaken the current disparate impact standard and fail to hold defendants accountable for housing discrimination.

I.   HUD's Proposed Rule Would Make It Unnecessarily Difficult for a Plaintiff to Prevail on a Disparate-Impact Theory of Liability

HUD's Proposed Rule would make drastic changes to fundamentally weaken disparate impact liability, a longstanding enforcement tool. The Proposed Rule would allow insurance companies, financial institutions, municipalities, housing providers, and other major corporations to engage in covert discriminatory practices with impunity. The Proposed Rule would make it nearly impossible to prove disparate impact liability and would eliminate the incentives for covered entities to continue doing their part to eliminate discrimination. Accordingly, the Proposed Rule is directly contradictory to Congress's "broad remedial intent" in passing the FHA.[4]

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[1]   *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, 135 S. Ct. 2507 (2015) (quoting HUD's Current Rule at length).

[2]   *Id.* at 2521.

[3]   *Id.* at 2521–22.

[4]   *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982)

a. The Proposed Rule Would Substantially Alter the Burden of Proof for Disparate Impact Liability Under the FHA

The Proposed Rule would shift the burden of proof and create inordinately high barriers that would make it significantly more difficult to bring the bedrock housing discrimination cases that Justice Kennedy expressly stated in *Inclusive Communities* should be brought using disparate impact theory.[5]

The Proposed Rule would undermine the purpose of the FHA and hurt communities in some of the following ways:

- Victims of housing discrimination will face a drastically higher burden to prove a disparate impact claim under the FHA. By requiring plaintiffs to plead, as an element of their claims, that a challenged policy or practice is "arbitrary, artificial, and unnecessary" to achieve a valid interest or legitimate objective, the Proposed Rule would require plaintiffs to read the defendant's mind to surmise which justifications it might invoke, and preemptively debunk them.

- The Proposed Rule would make it even harder to challenge national origin discrimination that is directed at particular groups of immigrants and language minorities, contrary to HUD's own existing guidance and case law.

- A policy or practice that produces a profit will be immune from challenge for its discriminatory impact under the Proposed Rule unless there is an alternative approach that produces as much money—even if the business could use alternate approaches that are less discriminatory while still significantly profitable. This will be practically impossible for most plaintiffs to demonstrate, due to the typical information imbalance between defendant housing entities and plaintiffs.

- The proposed rule would undermine the implementation of the *Olmstead* integration mandate. Under the Americans with Disabilities Act, individuals with disabilities have the right to live in the community with supports, rather than in institutions or homeless shelters. But many rules and policies—such as requirements to "live independently" or to have employment income, or rules against "group homes" or penalizing housing subsidies[6]—function to bar disabled individuals from housing in the community.

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[5] *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, __ U.S. __, 135 S.Ct. 2507, 2522 (2015).

[6] For example, the ACLU of Indiana brought and settled litigation under the FHA challenging a restrictive covenant limiting occupancy to "single families" that interfered with the sale of property to an organization that planned to establish a group home for disabled adults. *See Fair Hous. Ctr. of Cent. Indiana, Inc. v. Brookfield Farms Homeowners' Ass'n*, No. 4:14-cv-00058-PPS-JEM, 2016 WL 481983 (N.D. Ind. Feb. 8, 2016). *See also Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002, 1007–09 (W.D.N.Y. 1990) (finding that requirement that housing applicants with disabilities be able to "live independently" violated the Fair Housing Act and its regulations by having the effect of disability discrimination); *Sharpvisions, Inc. v. Borough of Plum*, 475 F. Supp. 2d 514, 525–26 (W.D. Pa. 2007) (finding that zoning ordinance and policies defining "family" to exclude disabled individual who lived with support had an unlawful disparate impact on individuals with disabilities); *Connecticut Fair Hous. Ctr.,*

- The requirement for plaintiffs to plead a "robust causal connection" between the challenged policy or practice and the discriminatory effect would be incredibly difficult to meet in many cases. This is especially true in the context of algorithmic modeling, which is typically proprietary and incorporates a host of complex factors that are not transparent to the public.

- A business practice that relies on statistics or algorithms and has some predictive value will almost always be immune from liability, because such predictive algorithms, by nature and design, serve a valid interest or legitimate objective. This amendment could have the effect of immunizing most credit scoring, pricing, tenant screening, and underwriting models from liability under the FHA, even when it is clear that they result in the discriminatory denial of housing or credit.

The Proposed Rule contains a host of changes that would ultimately result in an unworkable disparate-impact standard of liability. Moreover, the proposed changes dangerously move housing providers, municipalities, and corporations away from seeking out less discriminatory alternatives to harmful policies and practices. The Current Rule is necessary to effectively challenge systemic inequalities, such as persistent residential segregation, housing and lending discrimination against historically marginalized groups, the unnecessary institutionalization of people with disabilities, and housing instability suffered by survivors of domestic violence.

b. The Proposed Rule Would Erect Unnecessary Barriers to Proving Disparate-Impact Liability Based on Protected Characteristics for a Broad Swath of Housing Policies and Practices

If adopted, HUD's Proposed Rule would significantly undermine the FHA's goal to redress housing discrimination based on protected characteristics on a broad range of housing policies and practices, including tenant-screening policies, occupancy restrictions, perpetuation of racial segregation, and many others.

i. Tenant-Screening Policies

HUD's Proposed Rule will undermine efforts to address unjust tenant-screening policies that unnecessarily use proxies to exclude groups protected under the FHA. One such proxy is criminal history. African American and Hispanic people "are arrested, convicted, and incarcerated at rates disproportionate to their share of the general population."[7] Due to these

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Inc. v. Rosow, No. 3:10-cv-01987 (D. Conn. filed Dec. 17, 2010) (challenge to policy of refusing to rent to applicants who receive income from sources other than employment as having a disparate impact on individuals with disabilities, settled May 1, 2013); *L.C. v. LeFrak Org., Inc.*, 987 F. Supp. 2d 391, 402 (S.D.N.Y. 2013) (finding that plaintiffs sufficiently alleged that policy requiring more burdensome rental process for people who are recipients of housing subsidies has a disproportionate effect on people with HIV); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (finding that zoning ordinance blocking home for people with intellectual disabilities was based on irrational prejudice).

[7] U.S. Dep't of Hous. & Urban Dev., *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transaction*s (Apr. 4, 2016), at 2.

disparities, tenant-screening policies that screen prospective tenants for criminal records will likely have a disproportionate impact on minority applicants. Accordingly, in 2016, HUD's General Counsel concluded:

> While having a criminal record is not a protected characteristic under the [FHA], criminal history-based restrictions on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another (i.e., discriminatory effects liability).[8]

The Current Rule provides a reasonable three-step burden-shifting test for establishing disparate-impact liability. After the plaintiff shows that a given policy has a disparate impact on a protected group at step one, the following two steps focus on the purpose of the housing policy and whether that purpose can be achieved through a less discriminatory means. That approach effectively balances each side's interests.

In the criminal background check context, the second step requires examining the purpose of the background check. If that purpose is to reduce crime, the defendant must cite evidence showing that criminal history checks are *needed* to achieve that interest—i.e., are needed to reduce crime.[9] This burden appropriately puts the onus on a defendant to prove *why* it has the policy, and *why* the policy is necessary to achieve its stated aim. If the actual reason is to reduce the type of crime that may endanger neighbors or property values, the policy should be tailored to focus on *those* crimes. This leads to the third step, which allows the plaintiff to show that a less discriminatory alternative will satisfy the defendant's legitimate interest.[10] At this step, the plaintiff could propose any number of reasonable policies that might have eluded the respondent's thinking.

This very scenario happened in a case that the ACLU and ACLU of Virginia, with other fair housing advocates, settled in August, 2019. There, the plaintiff alleged that a property owner and management company in Virginia violated the FHA due to its blanket ban on applicants with felonies and certain other crimes.[11] The defendants agreed to replace their policy for one that excludes all arrests and misdemeanor convictions and focuses instead on relevant felonies—i.e., those that may suggest a risk to neighbors or property.[12] This case illustrates the merits of the existing burden-shifting test. Placing the onus on housing providers, who are best positioned to adopt fair housing practices from the start, to prove an objective and non-discriminatory basis for a practice helps deter overly broad policies that could achieve their legitimate aims in less discriminatory, more narrowly tailored ways. If the purported goal is to reduce relevant crimes, then housing providers cannot credibly justify banning *all* applicants with *any* criminal history, such as a single shoplifting charge, from living in their housing complex. Such a blanket policy

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[8]   *Id.*

[9]   *Id*. at 4–5.

[10]   *Id*. at 7–8.

[11]   *HOME Settles Race Discrimination Lawsuit Against Sterling Glen Apartments; Settlement Includes New Application Policy Regarding Criminal History* (Aug. 6, 2019), https://acluva.org/en/press-releases/home-settles-race-discrimination-lawsuit-against-sterling-glen-apartments-settlement.

[12]   *Id*.

that disproportionately excludes protected groups cannot be justified when better, more inclusive policy alternatives exist.

Under the Proposed Rule, this long-standing, judicially-sanctioned test would be replaced by one that allows a defendant to cite only a "valid" interest in support of its policy. This newly-created standard has no basis in the FHA or in case law. It also, apparently, is not required. The defendant "may" show that the challenged policy or practice advances a valid interest, or it may choose to do nothing. There is no requirement that, upon a showing of a *prima facie* case, the defendant do anything to justify its policy. And even if the defendant does point to a valid interest, it need not show that the valid interest is served by the challenged policy or practice. In the criminal record screening context, this means the valid interest of "crime reduction" could be used to justify absolute bans on anyone who has ever been charged or convicted of any crime. Such a result is wholly at odds with the FHA's statutory purpose and case law—creating unnecessary barriers to housing for people with criminal records. Such a policy, by contrast, would justifiably fail under the Current Rule, under which the defendant *must* provide a legally sufficient justification for its policy or practice.

The same analysis applies to tenant-screening policies that deny prospective applicants based on their credit and eviction histories. Research has shown that tenant-screening policies that categorically deny applicants based on lower credit scores or prior eviction filings have a discriminatory impact on people of color and women.[13] Under the Current Rule, unless a defendant *and* the plaintiff cannot prove any less discriminatory alternatives exist, the policies must be rescinded or replaced with a less discriminatory method for answering any legitimate concerns a provider may have about an applicant's credit and eviction history. As a public policy matter, such an approach strikes a reasonable balance between an applicant's need for housing and a housing provider's desire for good tenants. The Proposed Rule, however, skews the balance in favor of a defendant, who can pass muster by citing only a "valid" interest—without explaining why that policy is needed to serve that interest.

Similarly, tenant-screening policies that deny housing to applicants who receive housing assistance or benefits, or that impose additional screenings on applicants who use housing subsidies, function to screen out individuals with disabilities.[14] Such policies have far-reaching and harmful impacts, as "[i]ncome based on disability is the most common form of supplemental income in the United States."[15] Source-of-income discrimination significantly limits housing opportunities for people with disabilities, as well as people of color, families with children, and women.[16] The Proposed Rule would make it unnecessarily difficult to combat these unjust tenant-screening policies and must be withdrawn.

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[13]   *See, e.g.*, Matthew Desmond, *Poor Black Women Are Evicted at Alarming Rates, Setting Off a Chain of Hardship*, MacArthur Foundation: How Housing Matters (Mar. 2014), https://www.macfound.org/media/files/HHM_Research_Brief_-_Poor_Black_Women_Are_Evicted_at_Alarming_Rates.pdf; Lisa Rice & Deidre Swesnik, *Discriminatory Effects of Credit Scoring on Communities of Color*, 46 Suffolk U.L. Rev. 935, 949 (2013).

[14]   *See, e.g.*, Kinara Flagg, *Mending the Safety Net Through Source of Income Protections: The Nexus Between Antidiscrimination and Social Welfare Law*, 20 Colum. J. Gender & L. 201, 206 (2011).

[15]   *Id.* at 205.

[16]   *Id.* at 206–10.

ii. Occupancy Limits

Occupancy restrictions are yet another example of a proxy—in this case, the number of residents per bedroom—that can unjustifiably hurt groups protected by the FHA. Under the Proposed Rule, cities and private housing providers could restrict occupancies to one person per bedroom without justifying their decision. A municipality, for example, would not be required to explain how such a restriction relates to a legitimate governmental objective, leading to unfair and exclusionary results. In an ongoing case in Minnesota, the ACLU and ACLU of Minnesota are prosecuting the City of Faribault for maintaining an occupancy restriction of two people per bedroom—regardless of the size of the bedrooms and unit, the ages of children in the residence, or the configuration of the unit.[17] This restriction has an unjustified disparate impact on residents of Somali descent, given their larger families, relative to the non-Somali population.[18] Under existing law, the City has the burden to identify the interest supposedly served by this restriction and, if it succeeds, the plaintiffs will have the opportunity to show why a narrower restriction would suffice to achieve the City's interest. Under the Proposed Rule, however, it would be significantly easier for defendants like the City of Faribault to justify such arbitrary restrictions, and much harder for a plaintiff to prevail on the third prong, given the new pass for a defendant's bottom line.

Policies or zoning ordinances that restrict shared occupancy by unrelated adults are another example of a method by which individuals with disabilities are excluded from housing.[19] Courts have recognized that such policies have a disparate impact on individuals with disabilities, because such individuals may need to live in group settings for financial and programmatic reasons.[20] As such, the Proposed Rule must be withdrawn to ensure equal and fair access to housing.

iii. Perpetuation of Racial Segregation

HUD's Proposed Rule excludes "perpetuation-of-segregation" from the definition of a discriminatory effect, an unexplained and significant departure from the existing commitment to eliminate vestiges of segregation. As recognized by the Supreme Court, the FHA's Current Rule has played a vital role in "moving the Nation toward a more integrated society" and combatting the perpetuation of residential segregation through exclusionary zoning and other land-use restrictions.[21] Accordingly, the Current Rule provides a tool for enforcing the FHA's protections against facially neutral conduct that perpetuates existing patterns of residential segregation by race without any legitimate basis.[22] Courts have consistently recognized that "housing

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[17]   *Jones et al. v. City of Faribault*, https://www.aclu.org/cases/jones-et-al-v-city-faribault; see also *The Keating Memorandum*, U.S. Dep't of Housing and Urban Development, Office of General Counsel, Fair Housing Enforcement: Occupancy Cases (March 20, 1991), available at https://www.hud.gov/sites/documents/DOC_7780.PDF

[18]   *Jones et al. v. City of Faribault*, https://www.aclu.org/cases/jones-et-al-v-city-faribault

[19]   *See, e.g.*, Disability Rights Pennsylvania, *Discriminatory Zoning and the Fair Housing Act* (Apr. 2018), https://www.disabilityrightspa.org/wp-content/uploads/2018/04/DiscriminatoryZoningAndFHAAPRIL2018.pdf; *see also supra* note 3.

[20]   *Id.*

[21]   *Inclusive Cmtys.*, 135 S.Ct. at 2526.

[22]   *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 619–20 (2d Cir. 2016).

segregation both perpetuates and reflects this country's basic problems regarding race relations: educational disparities, police-community relations, crime levels, wealth inequality, and even access to basic needs such as clean water and clean air."[23] Considering the major impact of residential segregation on an individual's opportunities, the FHA's Current Rule is critical to ensuring the fulfillment of the FHA's objectives in creating a just and equitable society.

Today, residential segregation in the United States persists at alarming rates and inflicts far-reaching and lasting harms on communities of color and low-income families. Despite growing diversity in population, many cities across the country remain deeply segregated.[24] Segregation in neighborhoods correlates with high rates of school segregation and contributes to negative educational and socioeconomic outcomes for low-income students and students of color.[25] Schools in segregated neighborhoods, for example, suffer from high dropout rates, poor test results, and limited educational achievements.[26] Persistent segregation of neighborhoods also inhibits property value appreciation in predominantly Black neighborhoods as compared to predominantly white neighborhoods, even when the characteristics of the homes and neighborhoods are otherwise the same.[27] Research has further found that residential segregation may influence discriminatory policing in neighborhoods that are predominantly minority residents.[28] Accordingly, the ACLU opposes any change to HUD's Current Rule that omits perpetuation of segregation as a component of the disparate-impact theory of liability.

iv. Discrimination Based on National Origin Against Immigrants and Language Minorities

Disparate-impact liability has been a vital tool for holding housing providers accountable for excluding people of particular national origins, under the guise of excluding immigrants. The statuses of being a non-citizen, an immigrant, or unable to communicate in English are not statutorily enumerated as protected classes under the FHA. This statutory gap allows housing providers to establish barriers to housing access based on criteria, such as language ability or having a Social Security Number. These criteria work to exclude people based on immigration status, but are frequently closely correlated with being of Latinx or Asian national origin. In 2017, the National Fair Housing Alliance reported elevated rates of housing discrimination

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[23]   *Avenue 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 503 (9th Cir. 2016).

[24]   Aaron Williams & Armand Emamjomeh, *America is more diverse than ever – but still segregated*, Wash. Post (May 10, 2018), https://www.washingtonpost.com/graphics/2018/national/segregation-us-cities/.

[25]   Urban Institute, *Segregated Neighborhoods, Segregated Schools?* (Nov. 28, 2018), https://www.urban.org/features/segregated-neighborhoods-segregated-schools.

[26]   Margery Austin Turner & Karina Fortuny, The Urban Institute, *Residential Segregation and Low-Income Working Families* (Feb. 2009), https://www.urban.org/sites/default/files/publication/32941/411845-Residential-Segregation-and-Low-Income-Working-Families.PDF.

[27]   Richard D. Kahlenberg & Kimberly Quick, *The Government Created Housing Segregation. Here's How the Government Can End It.*, The American Prospect, July 2, 2019, https://prospect.org/article/government-created-housing-segregation-heres-how-government-can-end-it.

[28]   Emily Badger, *Baltimore shows how historic segregation shapes biased policing today*, Wash. Post (Aug. 10, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/08/10/baltimore-shows-how-historic-segregation-shapes-biased-policing-today/.

complaints from Latinx complainants experiencing housing harassment or displacement from housing because of immigration status.[29]

Courts have applied the disparate-impact theory of liability to such policies and practices, allowing challenges to discriminatory practices to proceed where proving intent to discriminate based on national origin would be extremely difficult. For example, in *de Reyes v. Waples Mobile Home Park Ltd. P'ship*, the Fourth Circuit held that a group of immigrant plaintiffs adequately stated a national origin disparate-impact claim against a landlord who began requiring a Social Security Number or other evidence of lawful immigration status in order to renew their leases.[30]

Consistent with these precedents, HUD's own guidance recognizes that discrimination based on language can have a discriminatory impact based on national origin, and that this would violate the FHA.[31] In this 2016 guidance, HUD stated that "[a] requirement involving citizenship or immigration status will violate the [FHA] when it has the purpose or unjustified effect of discriminating on the basis of national origin."[32]

As previously discussed, the Proposed Rule substantially increases a plaintiff's burden to allege a *prima facie* case and creates absolute defenses that are inconsistent with the statute and the broad construction it has been given by the Supreme Court and other courts. The Proposed Rule, therefore, would impede the ability of the most vulnerable and marginalized communities to enforce their fair housing rights. This result would undermine the FHA's stated legislative objective to further fair housing throughout the United States; conflict with case law recognizing that the FHA's protections are not limited by citizenship or immigration status; and run counter to HUD's own past positions recognizing the rights of immigrants to be protected from unjustified policies that exclude members of protected national origin groups.

> ### v. Gender-Based Housing Discrimination Against Women and Women-Headed Families

Women of all identities, particularly those who face violence and who have families to support, should feel protected under the FHA. Property owners, housing providers, and local governments

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[29]   Nat'l Fair Hous. Alliance, *Making Every Neighborhood a Place of Opportunity: 2018 Fair Housing Trends Report* at 80 (2018), *available at* https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report_4-30-18.pdf.

[30]   *See de Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 431–32 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 2026 (2019) (citing plaintiffs' allegations that in the relevant housing market, "being an illegal immigrant . . . correlates with being Latino (a protected class) . . . . we must infer that Congress intended to permit disparate-impact liability for policies aimed at illegal immigrants when the policy disparately impacts a protected class . . . ."). *See also Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1194-97 (M.D. Ala. 2011), *vacated as moot*, No. 11-16114-CC (11th Cir. May 17, 2013) (finding likelihood of success on the merits of challenge to state law limiting ability to occupy mobile homes based on immigration status would have an unjustified discriminatory impact on Latinos, who were overrepresented among mobile home residents in the state and among the state's non-citizen population).

[31]   U.S. Dep't of Hous. & Urban Dev., *Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency*, at 3 (Sept. 15, 2016), https://archives.hud.gov/news/2016/pr16-135-lepmemo091516.pdf; 24 C.F.R. § 1.4(b)(2)(i).

[32]   *Id.*

are increasingly enforcing discriminatory policies that not only bar women from accessing housing, but also evict them from their homes.[33] The ACLU urges HUD to immediately withdraw the Proposed Rule and instead advance housing policies that strengthen—not undermine—the existing disparate impact theory that allows for stable, safe, and affordable housing for all.

1. HUD's Proposed Rule Will Make It Significantly More Difficult to Bring Disparate-Impact Challenges on Behalf of Domestic Violence Survivors—the Vast Majority of Whom Are Women

Domestic violence is a leading cause of homelessness for women in the United States.[34] Over 90% of homeless women report having experienced domestic abuse or sexual violence in their lives, while over 50% of homeless women report that domestic violence was the immediate cause of their homelessness.[35] Access to housing is absolutely critical for survivors, as lack of safe and affordable housing options is regularly reported as a primary barrier to escaping abuse.[36] Homelessness can also be a precursor to additional violence, because a survivor is at the greatest risk of violence when separating from an abusive partner.[37] HUD's Current Rule ensures adequate protections for domestic violence survivors who denied housing because they accessed emergency services, defended themselves, or experienced abuse in their homes.

In particular, the FHA has provided significant protections against unjust landlord policies that penalize survivors because of the abuse they experienced—including unjust emergency transfer policies and policies that hold survivors responsible for abuse in their homes or noise or property damage arising from the violence. By significantly weakening disparate impact as a viable legal theory under the FHA, HUD's Proposed Rule could allow landlords, housing providers, municipalities, and other actors to adopt and enforce these discriminatory policies without facing liability for their harmful impacts on survivors. HUD's attempt to roll back disparate impact theory could allow the continued implementation of the following deeply flawed policies, which HUD has previously spoken out against and combatted through disparate impact theory:

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[33]   ACLU Women's Rights Project, *Chronic Nuisance and Crime-Free Ordinances: Endangering the Right of Domestic Violence Survivors to Seek Police Assistance*, https://www.aclu.org/sites/default/files/assets/nuisance_ordinance_issue_summary_-_final.pdf; *see also* Amanda K. Gavin, Comment, *Chronic Nuisance Ordinances: Turning Victims of Domestic Violence into "Nuisances" in the Eyes of Municipalities*, 119 Penn. St. L. Rev. 257, 257–58 (2014).

[34]   *See* ACLU Women's Rights Project, *Domestic Violence and Homelessness* (2006), http://www.aclu.org/pdfs/dvhomelessness032106.pdf; *see also* U.S. Conference of Mayors, *A Status Report on Hunger and Homelessness in America's Cities: A 25-City Survey* (Dec. 2014); *see also* Baker et al., *Domestic Violence, housing instability, and homelessness: A review of housing policies and program practices for meeting the needs of survivors*, 15 Aggression & Violent Behavior 430 (2010).

[35]   Monica McLaughlin & Debbie Fox, National Network to End Domestic Violence, *Housing Needs of Victims of Domestic Violence, Sexual Assault, Dating Violence, and Stalking* (2019), https://nlihc.org/sites/default/files/AG-2019/06-02_Housing-Needs-Domestic-Violence.pdf.

[36]   *See* Charlene K. Baker et al., *Domestic violence, housing instability, and homelessness: A review of housing policies and program practices for meeting the needs of survivors*, 15 Aggression & Violent Behavior 430, 430–39 (2010), https://b.3cdn.net/naeh/416990124d53c2f67d_72m6b5uib.pdf.

[37]   *See id.* at 431.

- When domestic violence survivors request transfers within housing units to escape their abusers, they often face obstacles from property owners. Under the FHA's Current Rule, failure to grant emergency transfer requests can constitute impermissible discrimination based on sex. Cases using the disparate impact theory have resulted in the adoption of new policies that ensure that survivors who are in imminent danger may request emergency transfers.[38]

- Some landlords and housing providers evict or threaten to evict domestic violence survivors in accordance with "one-strike" or "crime-free" policies that punish survivors because of the abuse they experienced in their home.[39] These policies result in survivors and their children being evicted and rendered homeless for violence done to them or by their abusers. The Current Rule remains critical for combatting these unjust policies.[40]

- Some landlords evict survivors and their children from housing for reasons directly related to domestic violence like noise complaints during abusive attacks, damage abusers do to the rental unit, and economic abuse. The Violence Against Women Act ("VAWA") does not protect the housing of survivors who live in apartments that are not subsidized by the federal government. The FHA's Current Rule helps to protect survivors who live in private apartments or state-funded subsidized housing from eviction due to abuse.

- In many jurisdictions, nuisance ordinances coerce landlords to evict or threaten to evict households based on calls for police assistance or emergency services, disproportionately harming domestic violence victims. Research has also demonstrated that nuisance and crime-free ordinances disproportionately impact communities of color, low-income households, and people with disabilities.[41] In 2016, HUD issued guidance on how the FHA's Current Rule is an important tool for challenging the devastating consequences of nuisance ordinances on domestic violence survivors and other vulnerable and marginalized communities.[42]

Not only do these policies increase the risk of homelessness for survivors of violence, but they bar survivors from obtaining stable housing in the first place. A landlord may choose not to rent to applicants because they are domestic violence survivors.[43] This can take the form of

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[38]   *See Blackwell v. H.A. Hous. LP,* Civil Action No. 05-cv-01225-LTB-CBS (D. Colo. 2005) (prohibiting discrimination against survivors of domestic violence and allowing them to request an emergency transfer when in imminent danger).

[39]   *See, generally*, *Warren v. Ypsilanti Hous. Auth.*, Case No. 4:02-cv-40034 (E.D. Mich. 2003) (defendant agreed to cease evicting survivors of domestic violence under its "one-strike policy").

[40]   *See id.*

[41]   ACLU & New York Civil Liberties Union, *More Than a Nuisance: The Outsized Consequences of New York's Nuisance Ordinances* (2018), https://www.nyclu.org/sites/default/files/field_documents/nyclu_nuisancereport_20180809.pdf.

[42]   U.S. Dep't of Hous. & Urban Dev., *Office of General Counsel Guidance on Application of FHA Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services* (2016), available at https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF.

[43]   1985 N.Y. Op. Att'y Gen. 45 (Nov. 22, 1985); Anti-Discrimination Ctr. of Metro N.Y., *Adding Insult to Injury: Housing Discrimination Against Survivors of Domestic Violence* (Aug. 2005), http://www.antibiaslaw.com/sites/default/files/all/DVReport.pdf; *see also* Equal Rights Ctr., *No Vacancy: Housing Discrimination Against Survivors of Domestic Violence in the District of Columbia* (Apr. 2008).

intentional discrimination, or it can take the form of unintentional discrimination that the FHA can only eradicate through disparate impact theory.

Because the vast majority of domestic violence survivors are women, policies that discriminate against survivors have an unlawful disparate impact on women. The Proposed Rule will jeopardize housing protections for survivors and, therefore, must be withdrawn.

<div align="center">

2. The Proposed Rule Will Violate HUD's Obligations to Protect Women and their Families Who are Seeking Housing

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The FHA's Current Rule affords significant protections to families, particularly women with children.[44] Research has consistently shown that the majority of primary caregivers are women.[45] Moreover, nearly one out of four mothers are raising their children on their own.[46] If HUD's Proposed Rule is enacted, landlords and housing providers could be able to implement restrictive policies that unreasonably limit families' housing choices without facing liability.[47]

Advocates have relied on the FHA's Current Rule to challenge unjust policies that harm families, such as overly restrictive occupancy requirements. Under the FHA, for example, HUD is tasked with determining if an occupancy standard is reasonable. The agency considers factors such as the size of bedroom and unit and age of the children. This analysis is extremely important because it prevents discrimination based on familial status, a protected class under the FHA.[48]

Similarly, the FHA's disparate impact theory has been used to challenge housing policies that restrict children from accessing certain amenities. Policies that overly restrict the use of facilities that are overwhelmingly enjoyed by children, such as pools or courtyards, can be considered discriminatory under the FHA.[49] For example, a landlord's policy against congregating in common areas may have a discriminatory impact on families with children when evidence shows that children are more likely than adults to play, or congregate, in such places.[50]

The FHA's Current Rule has been the foundation to preventing overly restrictive landlord policies that negatively impact families, particularly women with children. If HUD's Proposed Rule takes effect, it will become unnecessarily difficult to challenge restrictive policies on familial status that that are facially neutral, yet have a disparate impact on families. The

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[44] *See* 42 U.S.C. §§ 3601-19.

[45] Nat'l P'ship for Women & Families, *The Female Face of Family Caregiving* (Nov. 2018), http://www.nationalpartnership.org/our-work/resources/economic-justice/female-face-family-caregiving.pdf.

[46] A.W. Geiger et al., Pew Research Ctr., *6 Facts About U.S. Moms* (May 8, 2019), https://www.pewresearch.org/fact-tank/2019/05/08/facts-about-u-s-mothers/.

[47] *See* Lauren Brasil, *Occupancy Policies and the FHA: How Many is Too Many?*, Fair Housing Project (Dec. 4, 2018), available at https://www.fairhousingnc.org/newsletter/occupancy-policies-and-the-fair-housing-act-how-many-is-too-many/.

[48] *See Housing Opps. Project for Excellence, Inc. v. Key Colony No. 4 Condo. Assoc.,* 510 F. Supp. 2d 1003 (S.D. Fla. 2007) (holding that residents had successfully stated a disparate impact claim because the restrictive occupancy rules had discouraging effects on families with more than two children).

[49] *See id.*

[50] *Khalil v. Farash Corp.*, 260 F. Supp. 2d 582, 589 (W.D.N.Y. 2003).

additional hurdles to establish a *prima facie* case will dissuade women with children from pursuing cases, leaving them with no other choice but to face eviction and homelessness.

> *vi.   Access to Housing and* Olmstead *Compliance for People with Disabilities*

A 2017 report entitled *Priced Out: The Housing Crisis for People with Disabilities*, co-authored by the Technical Assistance Collaborative, a policy group focused on affordable and permanent supportive housing for very low-income people with disabilities, and the Consortium for Citizens with Disabilities Housing Task Force, concluded:

> In 2016, millions of adults with disabilities living solely on Supplemental Security Income (SSI) found that renting even a modest unit in their community would require nearly all of their monthly income. In hundreds of higher-cost housing markets, the average rent for such basic units is actually much greater than the entirety of an SSI monthly payment.[51]

As a result, "non-elderly adults with significant disabilities in our nation are often forced into homelessness or segregated, restrictive, and costly institutional settings such as psychiatric hospitals, adult care homes, nursing homes, or jails."[52]

Compounding this concern, people with many types of disabilities, including people with mobility impairments, people who are blind, and people who are deaf or hard of hearing, face additional barriers securing affordable housing that is also accessible.

These concerns make it critical to ensure that protections against disability-based discrimination in housing are not weakened. Complaints of disability discrimination already comprise the largest percentage of housing discrimination complaints received by both public and private fair housing enforcement organizations since the early 2000s.[53] The inability to preserve housing will not only put people with disabilities at risk of homelessness and institutionalization, but will likely increase costs to state and local governments, which will incur the costs of institutionalization, shelter placements, and emergency department visits.

The availability of rental subsidies has been critical to ensure the availability of affordable and accessible housing for people with disabilities. Such subsidies are a key aspect of implementing the Americans with Disabilities Act's integration mandate and the Supreme Court's *Olmstead* decision. The ADA requires public entities to administer services to people with disabilities in the most integrated setting appropriate. Supported housing units scattered in buildings throughout the community are necessary to implement the ADA's integration mandate. To make this type of supported housing available, state and local governments typically rely on rental

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[51]   Technical Assistance Collaborative, *Priced Out in the United States* (2017), http://www.tacinc.org/knowledge-resources/priced-out-v2/.

[52]   Gina Schaak, *et al.*, *Priced Out: The Housing Crisis for People with Disabilities* (Technical Assistance Collaborative and Consortium for Citizens with Disabilities Housing Task Force, Dec. 2017), at 8, http://www.tacinc.org/media/59493/priced-out-in-2016.pdf.

[53]   Nat'l Fair Hous. Alliance, *The Case for Fair Housing, 2017 Fair Housing Trends Report* (Apr. 2017), at 27, https://nationalfairhousing.org/wp-content/uploads/2017/04/TRENDS-REPORT-4-19-17-FINAL-2.pdf.

subsidies that help support people with disabilities to live in their own apartments or homes, secured through the ordinary housing market.

But many housing providers discriminate against people who rely on disability benefits and use rental subsidies. And many covered entities attempt to bar "group homes" for people with mental disabilities. A rule that would effectively eradicate disparate impact protections would interfere with access to housing for people with disabilities, and the obligation of public entities to comply with the ADA's integration mandate.

c. The Proposed Defenses to Shield Algorithmic Models Undermine the Purpose and Spirit of Disparate Impact Liability

HUD has extended an invitation for comments on the "nature, propriety, and use of algorithmic models as related to the defenses in (c)(2)." The Proposed Rule would allow a defendant to avoid liability for using an algorithmic model that disproportionately excludes members of protected classes if the defendant can prove one of three defenses—any of which will operate as a complete defense, with no opportunity for a plaintiff to prove the existence of less discriminatory alternatives to achieve any legitimate business objectives.

Under the Current Rule, the disparate-impact analysis does not stop if the defendant proves a legitimate business justification. Instead, the necessity of that justification is weighed against the plaintiff's showing of discriminatory effect, and a plaintiff can still prevail by pointing to less discriminatory alternatives that further the same justification. The Supreme Court has described disparate-impact liability as a balancing test. By contrast, HUD's new proposed defenses relating to algorithmic models tip the scale inexorably against plaintiffs. There would be no more balancing, just *carte blanche* for defendants to use algorithmic modeling notwithstanding clear discriminatory effects. The Proposed Rule would effectively eviscerate a plaintiff's ability to challenge the disparate impact of practices that are critical to accessing housing, including tenant screening and credit lending decisions, by creating three complete defenses and omitting a key component of HUD's current burden-shifting framework that the Supreme Court and numerous Circuit Courts have likewise recognized.

HUD's stated purpose in proposing these defenses is to limit disparate impact so that "employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system."[54] But Congress has not given HUD a mandate to protect corporate profits or the free-enterprise system. Congress has directed HUD to enforce and interpret the FHA, and specifically to affirmatively further fair housing.[55] The entire premise of the defenses to disparate-impact liability for algorithmic models—limiting disparate-impact liability to preserve business profits—is contrary to the purpose of the FHA. Congress enacted the FHA to provide "for fair housing throughout the United States,"[56] not to promote profit and business interests. Yet each of the three proposed defenses for cases involving the use of algorithmic models would make it highly unlikely that a plaintiff could prevail on a disparate-impact challenge.

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[54]   84 Fed. Reg. 42,855.
[55]   42 U.S.C. § 3608(e).
[56]   *Id.* § 3601.

i. *First Defense Related to Algorithmic Models*

The first defense, set forth in proposed 24 C.F.R. § 100.500(c)(2)(i), would allow a defendant to avoid liability if it can show that "the material factors that make up the inputs used in" an algorithmic model "do not rely in any material part on factors that are substitutes or close proxies for protected classes" and that the model accurately predicts, e.g., creditworthiness. This defense is unworkably vague. Beyond the fact that there is no definition provided for "algorithmic model," the defense does not define "material factors" or "in material part." The use of such vague terms will allow defendants to justify models that may be based in part on factors that are clear proxies for membership in a protected class—as long as the discriminatory factors are not "material" or the overall inputs are not based in "material part" on them. The Proposed Rule provides no framework by which the finder of fact could determine whether a factor was "material" to the inputs to the algorithmic model. Moreover, the phrase "in material part" is meaningless in the context of machine-learning models. Nor does the Proposed Rule provide guidance as to what constitutes a "substitute" or "close proxy," or how that is to be determined. Is zip code a "close proxy" for race in a racially segregated city? Is membership in an online Spanish language reading group a "substitute" for national origin or ethnicity? Moreover, research has revealed that some proxies are less obvious but correlate highly with certain groups.[57] For example, delivery of ads referring to "content stereotypically of most interest to Black users (e.g., hip hop) can deliver to over 85% Black users, and those referring to content stereotypically of interest to white users (e.g., country music) can deliver to over 80% white users, even when targeted identically by the advertiser."[58] Accordingly, this proposed defense is flawed, vague, and unworkable.

Beyond its excessive vagueness, the defense flips the disparate-impact theory on its head. It would shield a defendant from liability so long as the inputs are not substitutes or close proxies for membership in a protected class—in other words, the defendant could establish a complete defense by showing that the model does not use inputs that have been chosen as stand-ins for discrimination. But under decades of case law construing the FHA, it is no defense to disparate-impact liability to show that one did not decide to implement a challenged policy because it was a known proxy or substitute for protected class membership. The whole point of allowing disparate-impact liability is to hold a defendant accountable for a neutral practice that disproportionately harms members of a protected group without a legitimate business justification, even if exclusion was never the defendant's intent.

For example, in the quintessential case addressing disparate-impact liability under Title VII of the 1964 Civil Rights Act (which the Court acknowledged in *Inclusive Communities* is instructive in construing disparate impact under the FHA), the Supreme Court held that an employer could be liable under a disparate-impact theory for imposing a high school diploma requirement (which disproportionately excluded Black people in the relevant labor pool), without suggesting that the employer could defend itself by showing that a high-school diploma requirement was not a proxy for race.[59] In the heartland exclusionary zoning cases cited with

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[57]   Muhammad Ali et al., *Discrimination through optimization: How Facebook's ad delivery can lead to skewed outcomes*, https://arxiv.org/pdf/1904.02095.pdf.

[58]   *Id.* at 2.

[59]   *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1974).

approval by the Supreme Court in *Inclusive Communities*, no court suggested that the defendant municipalities could defend against disparate-impact liability under the FHA by showing that high-density housing was a substitute for race.[60] The proposed defense in § 100.500(c)(2)(i) creates a new shield to disparate-impact liability out of whole cloth.

By providing a defense if an input is not a substitute or proxy for membership in a protected class, the defense in § 100.500(c)(2)(i) furthermore fundamentally misunderstands the way that machine learning works. Machine learning does not depend solely on inputs, and can, over time, learn to identify protected class status (or proxies for protected class status). Thus, regardless of any initial intent in creating inputs, a machine-learning model could come to detect protected class status membership as a relevant predictive factor.[61]

It would, of course, be problematic if an algorithmic model were fed inputs that are obvious proxies for protected categories, but the much more likely scenario is one where an algorithm functionally infers membership in protected categories from a pool of data that does not explicitly include that information. For example, HUD's own secretary-initiated complaint against Facebook details how that platform has used algorithmic models that effectively recreate groupings defined by their protected class. Specifically, Facebook's advertising tool "group[s] users who 'like' similar pages (unrelated to housing) and presum[es] a shared interest or disinterest in housing-related advertisements," with the effect of "function[ing] just like an advertiser who intentionally targets or excludes users based on their protected class."[62]

Moreover, by its very design and purpose, "[m]achine learning discovers and generalizes patterns in [training] data and could, therefore, replicate bias. When implementing these models at scale, it can result in a large number of biased decisions, harming a large number of users."[63] Bias is incorporated into machine learning—producing discriminatory results—in a variety of ways, many of which are not attributable to insidious human intent or even recognizable by the model's creators. For example, bias could result from overrepresentation of certain groups in the data set, the techniques used to collect the data, an inadequate sampling strategy, or discarding data.[64] Yet under the Proposed Rule, a platform could not be held liable because no one has designed the model for the purpose of discriminating against a protected class or explicitly fed it information about or proxies for membership in protected categories.

By making the threshold for immunity a requirement that an algorithm not use inputs that are obvious proxies for protected categories, the Proposed Rule provides no protection from the potentially discriminatory effects of models that recreate historical biases without any discriminatory purpose. If the algorithm is trained on a historical data set generated via discriminatory practices, in which outcomes differ based on protected class status, the algorithm

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[60]   *Inclusive Cmtys.*, 135 S. Ct. at 2521–22 (citing "heartland" disparate-impact FHA cases challenging zoning laws that restricted multifamily rental and affordable housing).

[61]   *See, e.g.*, Barocas & Selbst, *Big Data's Disparate Impact*, 104 Cal. L. Rev. 671, 695-96 (2016) (internal footnotes omitted).

[62]   Sec'y of Dep't of Hous. & Urban Dev. v. Facebook, HUD ALJ No. ___, FHEO No. 01-18-0323-8, Charge of Discrimination, ¶ 20, https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf.

[63]   Stacey Ronaghan, *AI Fairness – Explanation of Disparate Impact Remover* (Apr. 22, 2019), *available at* https://towardsdatascience.com/ai-fairness-explanation-of-disparate-impact-remover-ce0da59451f1.

[64]   *Id.*

may seek—in the absence of any human intent—to recreate such protected class status distinctions from whatever data it is given. The richer the data set, the more accurately it will be able to do so. As pointed out in a recent op-ed, a landlord who uses an algorithm to screen tenants "may wind up discriminating without realizing it, and a landlord who *wants* to discriminate has a formula for doing so."[65]

ii. *Second Defense Related to Algorithmic Models*

The second defense, in proposed § 100.500(c)(2)(ii), could absolve a company of liability if it can show that the model is developed by a third party according to "industry standards;" is not altered through the addition of the company's own "inputs or methods;" and is being used by the company as intended by the third party that created it. This defense could again provide immunity from liability for the use of machine learning tools that are demonstrably biased—and known to be so.

The requirement that a model be developed according to "industry standards" offers no protection from the practices of industries in which discrimination has historically been the standard: any data sets that such an industry might use in an algorithmic model will necessarily reflect its historical discrimination. To give just one example, consider mortgage lending. The entire mortgage lending industry engaged in discrimination based on race during the redlining era (using quasi-neutral sounding policies based on redlined zip codes) and based on gender (using quasi-neutral sounding policies based on marital or parental status). These industry-wide practices, today universally recognized as discriminatory, should not be perpetuated by algorithmic models. Yet the Proposed Rule could protect "industry standard" models, even if those models were explicitly derived from historical data sets rife with the legacies of intentional discrimination.

The defense in § 100.500(c)(2)(ii) could provide sweeping immunity to mortgage lenders for the discriminatory effects of credit decisions because most of the algorithm-based financial products that lending institutions use to make such determinations are created by outside vendors, not in-house. This defense could permit housing providers and lenders to escape liability even in cases where the discriminatory effects of an algorithmic model are known and have been publicly documented. The proposed defense would also create a substantial disincentive for banks to investigate whether the externally created algorithms they use have discriminatory effects.

Instead of giving banks an incentive to outsource the creation of discriminatory models,[66] HUD should require financial institutions to ensure that the models they use to make credit decisions do not result in discriminatory outcomes—even if the decision-making model is created by another party.

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[65]   Andrew D. Selbst, "A New HUD Rule Would Effectively Encourage Discrimination by Algorithm," *Slate* (Aug. 19, 2019), *available at* https://slate.com/technology/2019/08/hud-disparate-impact-discrimination-algorithm.html.

[66]   There are scientific, data-driven tools to remove bias from algorithmic models, such as the Disparate Impact Remover. *See* Ronaghan, *supra* note _. "Bias mitigation may result in a lower performance metric (e.g. accuracy) but this doesn't necessarily mean the final model would be inaccurate." *Id.*

Access to loans that allow home ownership is a critical way to build wealth.[67] Yet historically and continuing through the present, patterns of loan allocation have reinforced patterns of inequality.[68] Allowing industry practices to dictate what is and is not lawful could leave tens of millions of Americans unprotected from discriminatory algorithms that deny them equal access to credit opportunities.

iii. *Third Defense Related to Algorithmic Models*

The third defense, set forth in proposed § 100.500(c)(2)(iii), could allow a defendant to defeat liability by proving that a neutral third-party has determined that the model is "empirically derived and is a demonstrably and statistically sound algorithm that accurately predicts risk or other valid objectives," and again, similar to the first proposed defense, that the factors do not "rely in any material part on factors that are substitutes or close proxies for protected classes under the FHA." This defense is flawed for many of the same reasons as the first defense—e.g., it does not define "material part" or "substitutes or close proxies," nor does it account for the fact that machine-learning models predictably—indeed, by design—recreate historical bias even without explicitly including membership in protected classes in their inputs. The defense also allows an ostensibly "objective and neutral third party" whose financial interests lie in "validating" the model to shield it from even basic scrutiny of its inputs, accuracy, and outcomes. Moreover, the authentication techniques used by such third-party validators, like the underlying methods involved, are typically proprietary and lack any transparency or accountability. Thus, even models that could not satisfy the first defense in proposed § 100.500(c)(2)(i) are likely to provide an escape from liability under the defense proposed in § 100.500(c)(2)(iii).

Machine learning by its nature draws correlations between input data and outcomes—in other words, because it makes predictions that are based on data, its predictions are fundamentally "accurate" in that sense. Accordingly, providing a defense that the algorithm is "accurate" would essentially give *carte blanche* to any algorithm that draws such predictive correlations, so long as input data do not explicitly take protected status into account. By implementing the Proposed Rule, HUD would abdicate its duty to enforce the FHA by potentially giving a pass to any entity that uses an algorithm that is an effective but discriminatory predictor. In other words, this defense would in essence permit the tech industry to police itself for bias. The pernicious consequences of the third defense are heightened by the fact that this subpart is presented as a complete defense, without any opportunity for a plaintiff to demonstrate less discriminatory alternatives to a discriminatory yet accurate predictor—omitting a key component of HUD's current burden-shifting framework that the Supreme Court and numerous Circuit Courts have likewise recognized.

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[67]   *See, e.g.*, Nat'l Ass'n of Home Builders, "Homeownership Is Primary Driver of U.S. Household Wealth," (June 1, 2018), https://www.nahb.org/en/news-and-publications/press-releases/2018/06/homeownership-is-primary-driver-of-US-household-wealth.aspx.

[68]   *See, e.g.*, Olivier Coibion et al., Greater Inequality and Household Borrowing: New Evidence from Household Data (May 2019 draft), *available at* https://eml.berkeley.edu/~ygorodni/CGKM.pdf.

II. Conclusion

The promise of housing equality is still unfulfilled in the United States, and disparate impact liability is an essential tool for combating the insidious housing discrimination that persists in our communities. The Proposed Rule would make it unnecessarily burdensome and onerous to prove disparate impact liability. It is in direct contradiction to HUD's mission, decades of legal precedent and the Supreme Court's recent decision in *Inclusive Communities*.

Before finalizing the current Disparate Impact Rule in 2013, HUD engaged in a thoughtful and thorough process, considering decades of federal court jurisprudence. The ACLU submitted comments arguing that the disparate impact rule was consistent with the standard set in *Inclusive Communities* case and does not need to be amended. In 2016, HUD considered additional federal court jurisprudence when it issued its well-reasoned supplement to insurance industry comments. HUD must preserve the current Disparate Impact Rule.

Thank you for the opportunity to comment. Please contact Jennifer Bellamy at jbellamy@aclu.org regarding these comments.

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